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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 JANICE A. KENNEDY,

11 Plaintiff,

12 v.

13 CAROLYN COLVIN,

14 Defendant.

CASE NO. C12-1139JLR

ORDER ADOPTING IN PART
AND MODIFYING IN PART
REPORT AND
RECOMMENDATION

15 **I. INTRODUCTION**

16 This matter comes before the court on the Report and Recommendation (“R&R”) of United States Magistrate Judge James P. Donohue (R&R (Dkt. # 15)), and Defendant Carolyn Colvin’s objections thereto (Objections (Dkt. # 16)). Having carefully reviewed
17 all of the foregoing, along with all other relevant documents and the governing law, the
18 court ADOPTS IN PART and MODIFIES IN PART the Report and Recommendation
19 (Dkt. # 15) and AFFIRMS the ruling of the Administrative Law Judge (“ALJ”) on all
20 points.
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I. BACKGROUND

This is an appeal from a denial of Disability Insurance Benefits (“DIB”). Plaintiff Janice Kennedy is a 51 year old woman with fibromyalgia. (Administrative Record (“AR”) (Dkt. # 10) at 182-83.) She has not been gainfully employed since October 1, 2008. (*Id.* at 46, 143.) In her most recent job, she was a receptionist, bookkeeper, and payroll clerk for a company called Union Bay Fabrication. (*Id.* at 46, 143.) Ms. Kennedy applied for DIB in 2009 under the Social Security Act. (*Id.* at 23.) Her application was denied by the Commissioner of the Social Security Administration (“Commissioner”) and was denied again on reconsideration. (*Id.* at 83, 87.) She requested a hearing, which was granted, and in 2011 an ALJ issued a decision agreeing with the Commissioner and finding that Ms. Kennedy was not disabled and therefore not entitled to DIB. (*Id.* at 23-31.)

Now, Ms. Kennedy appeals the ALJ’s decision to this court. In her appeal, she argues that she is in fact disabled and that the ALJ erred by concluding otherwise. (*See* Pltf.’s Opening Br. (Dkt. # 12).) Magistrate Judge Donohue agreed with her and issued an R&R recommending that the case be reversed and remanded for further administrative proceedings. (*See* R&R.) The Commissioner objected to the R&R, and those objections are now before the court. (Objections to R&R (Dkt. # 16).)

II. STANDARD OF REVIEW

A district court has jurisdiction to review a Magistrate Judge’s R&R on dispositive matters. Fed. R. Civ. P. 72(b). “The district judge must determine de novo any part of the magistrate judge’s disposition that has been properly objected to.” *Id.* “A judge of

1 the court may accept, reject, or modify, in whole or in part, the findings or
2 recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1). The court
3 reviews de novo those portions of the report and recommendation to which specific
4 written objection is made. *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir.
5 2003) (en banc).

6 While review of an R&R is de novo, the court must defer to the ALJ’s findings
7 and may set aside the Commissioner’s denial of social security benefits only if the ALJ’s
8 findings are based on legal error or not supported by substantial evidence in the record.
9 42 U.S.C. § 405(g); *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th Cir. 2005). The court
10 must examine the record as a whole and may not reweigh the evidence or substitute its
11 judgment for that of the Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.
12 2002). The ALJ determines credibility, resolves conflicts in medical testimony, and
13 resolves any other ambiguities that may exist. *Andrews v. Shalala*, 53 F.3d 1035, 1039
14 (9th Cir. 1995). When the evidence is susceptible to more than one rational
15 interpretation, the court must uphold the ALJ’s conclusion. *Thomas*, 278 F.3d at 954.

16 III. DISCUSSION

17 Ms. Kennedy argues that the ALJ made two errors in the proceedings below. The
18 court disagrees. First, Ms. Kennedy argues that the ALJ erred in evaluating her mental
19 health impairments. Magistrate Judge Donohue disagreed with her on this issue and
20 recommended affirming the ALJ on this point. The court has thoroughly examined the
21 record before it and finds the Magistrate Judge’s reasoning persuasive in light of that
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1 record. The court adopts that reasoning here, finding no need to expand on Judge
2 Donohue's recommendations.

3 Ms. Kennedy's second argument is a closer call. She argues that the ALJ
4 committed legal error by misapplying part of the test it used to determine whether she
5 was disabled. The ALJ determined that Ms. Kennedy was not disabled because, despite
6 her fibromyalgia, she could still perform the work she did at her previous job. In a
7 disability benefits proceeding, the claimant has the burden of showing that she is no
8 longer able to perform her "past relevant work." *Lewis v. Barnhart*, 281 F.3d 1081, 1083
9 (9th Cir. 2002). To prove this, the claimant must compare her present capacity with her
10 former work. *Villa v. Heckler*, 797 F.2d 794, 798 (9th Cir. 1986). If the claimant can
11 perform her past work, she is not disabled. 20 C.F.R. § 404.1502(f); *Lewis*, 281 F.3d at
12 1083. In this case, the ALJ determined that Ms. Kennedy could perform her past work
13 and therefore was not disabled. (AR at 31-32.)

14 There are two tests for determining whether a claimant is capable of performing
15 her past work. Either test is sufficient to conclude that the claimant is not disabled. The
16 difference between the two tests is that one assesses the claimant's capacity to "actually
17 perform" the work at her previous job while the other assesses the claimant's capacity to
18 "generally perform" the work of a similar job in the "national economy." *See* Social
19 Security Ruling 82-61. Under the "actual performance" test, the claimant is capable of
20 performing past work and therefore is not disabled if "the evidence shows that a claimant
21 retains the [functional capacity] to perform the functional demands and job duties of a
22 particular past relevant job as he or she actually performed it" *Id.* On the other

1 hand, under the “general performance” test, the claimant is capable of performing past
2 work and is not disabled if “the claimant retains the capacity to perform the functional
3 demands and job duties of the job as ordinarily required by employers throughout the
4 national economy.” *Id.*

5 Ms. Kennedy argues, and Judge Donohue’s R&R agrees, that the ALJ applied the
6 general performance test and applied it incorrectly. (*See* Resp. to Objections (Dkt. # 17)
7 at 2; R&R at 14-17.) On the other hand, the Commissioner argues that the ALJ did not
8 apply the general performance test at all but instead applied the actual performance test
9 and applied it properly. (Objections at 2-4.) As explained below, the court agrees with
10 the Commissioner.

11 First, the court examines the ALJ’s findings and concludes that the ALJ applied
12 the actual performance test and not the general performance test. (*See* AR at 31-32.) The
13 ALJ’s findings on this topic are relatively brief, so the court sets forth the relevant section
14 in its entirety below. Although the ALJ uses the phrase “normally performed” several
15 times in its findings, this passage as a whole suggests that the ALJ compared Ms.
16 Kennedy’s capacity not with similar work as ordinarily required by employers throughout
17 the national economy but with Ms. Kennedy’s own description of her previous job:

18 **6. The claimant is capable of performing past relevant work as a:**
19 **receptionist/bookkeeper (DOT 237.367-038) sedentary, semi-skilled**
20 **SVP 4. This work does not require the performance of work-related**
activities precluded by the claimant’s residual functional capacity (20
CFR 404.1565).

21 Vocational expert Mark Harrington testified that the claimant had the above
22 past relevant work. The claimant performed the above past relevant work

1 within the last fifteen years, the claimant did it long enough to learn it, and
2 the work constituted substantial and gainful activity.

3 In comparing the claimant's residual functional capacity with the physical
4 and mental demands of this work, I find that the claimant is able to perform
5 it as normally performed. Vocational expert Harrington testified that a
6 person with the claimant's residual functional capacity of sedentary work
7 and the same postural and environmental limitations would be able to
8 perform the above past relevant work.

9 The vocational expert testified that based on the claimant's description of
10 her last job, she worked a composite job of a receptionist, bookkeeper, and
11 payroll clerk, which are all sedentary semi-skilled jobs. The claimant
12 described this job as requiring her to lift less than ten pounds, sit for eight
13 hours, stand for two hours, and walk for three hours. (Exhibit 5E/9). This
14 adds to a 13-hour day, which is inconsistent with her statement that she
15 worked this job for eight hours per day. (Exhibit 5E/9). The claimant
16 described this job as answering telephones, doing payroll and billing that
17 are tasks normally performed while sitting. Thus, I find that her past work,
18 as she described it, was performed at a sedentary level. Nonetheless, even
19 if she was required to walk and stand for more than two hours, as is the
20 usual case for sedentary work, I find that because all of these jobs are
21 normally performed at the sedentary level, she can perform her past work as
22 normally performed.

(AR at 31-32.)

14 Plaintiff argues, and Magistrate Judge Donohue agrees, that the ALJ's use of the
15 phrase "as normally performed" is enough to conclude that the ALJ applied the general
16 performance test. (R&R at 14-17.) The court disagrees. The phrase "as normally
17 performed" is not equivalent to the phrase "perform[ed] the functional demands and job
18 duties of the job as ordinarily required by employers throughout the national economy."
19 *See Social Security Ruling 82-61*. Indeed, while the latter has a clear and specific
20 meaning, the former could have a different meaning depending on the context in which it
21 is used. Here, it is used in the context of the ALJ recounting Ms. Kennedy's description
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1 of her actual job, not in the context of the ordinary requirements of similar work
2 throughout the national economy. (*See* AR at 31-32.) Given this context, it makes more
3 sense to infer that “as normally performed” means something closer to “as she normally
4 performed it in her past job” than to “as it is generally performed in the national
5 economy.” The court must read the ALJ’s findings as a whole and, doing so, concludes
6 that the more reasonable inference is that the ALJ applied the actual performance test.

7 There is further evidence in the findings that the ALJ used the actual performance
8 test. Most of the operative comparisons in the passage are made between Ms. Kennedy’s
9 functional capacity and her prior work as she describes it:

10 The vocational expert testified that *based on the claimant’s description of*
11 *her last job*, she worked a composite job of a receptionist, bookkeeper, and
12 *payroll clerk, which are all sedentary semi-skilled jobs. The claimant*
13 *described this job as requiring her to lift less than ten pounds, sit for eight*
14 *hours, stand for two hours, and walk for three hours. The claimant*
15 *described this job as answering telephones, doing payroll and billing that*
16 *are tasks normally performed while sitting. Thus, I find that her past work,*
17 *as she described it, was performed at a sedentary level. Nonetheless, even*
18 *if she was required to walk and stand for more than two hours, as is the*
19 *usual case for sedentary work, I find that because all of these jobs are*
20 *normally performed at the sedentary level, she can perform her past work as*
21 *normally performed.*

22 (*Id.* (emphasis added).) Ms. Kennedy’s own description of her job is central to the ALJ’s
decision, and more importantly, it is this description that the ALJ compares to Ms.
Kennedy’s capacity. The ALJ would not have made this comparison under the general
performance test. Under that test, the ALJ would have compared Ms. Kennedy’s
capacity not with her old job as she described it, but with a generalized version of that job
constructed from expert testimony and occupational manuals.

1 This case resembles *Estate of Raftery v. Astrue*, No. C08-1208-CRD, 2009 WL
2 901899 (W.D. Wash. Mar. 30, 2009). In that case, the ALJ made a finding of disability
3 and wrote written findings similar to those at issue here. *See id.* at *3. The ALJ's
4 findings specifically mentioned "general performance" and appeared to rely on the
5 general performance test, but they also relied on the claimant's own description of his
6 work. *Id.* Unlike here, the ALJ in *Raftery* explicitly concluded that the claimant would
7 be able to perform his work "as generally performed." *Id.* On appeal, the claimant made
8 essentially the same argument that Ms. Kennedy makes here: that the ALJ applied the
9 general performance test and did so incorrectly. *Id.* The district court rejected the
10 claimant's argument, finding that "it is clear from the context of the ALJ's analysis that
11 the ALJ made an 'as actually performed' finding, not an 'as generally performed'
12 finding" (notwithstanding the fact that the ALJ actually professed to make an "as
13 generally performed" finding). *Id.* at *4. The district court concluded that the ALJ's use
14 of "as generally performed" was, at most, harmless error and "does not require remand to
15 modify the verbiage to 'as actually performed.'" *Id.*

16 The present case is strikingly similar and, if anything, the finding here is more
17 susceptible to categorization as an "as actually performed" finding. Like in *Raftery*, it is
18 clear from the context that the ALJ in this case made an "as actually performed" finding,
19 as detailed above. (*See* AR at 31-32.) Further, the ALJ here used the verbiage "as
20 normally performed," which is much more ambiguous than the "as generally performed"
21 verbiage found in *Raftery*. (*See id.*) It is true that the ALJ here was not crystal clear
22 about which test it used, but "even when an agency 'explains its decision with less than

1 ideal clarity,’ [a reviewing court] must uphold it ‘if the agency’s path may reasonably be
2 discerned.’” *Molina v. Astrue*, 674 F.3d 1104, 1121 (9th Cir. 2012) (quoting *Alaska*
3 *Dep’t of Evtl. Conservation v. EPA*, 540 U.S. 461, 497 (2004)). Accordingly, the court
4 holds that the ALJ used the actual performance test not the general performance test, and
5 to the extent the ALJ used the general performance test, any error was harmless. *See*
6 *Raftery*, 2009 WL 901899 at *4.

7 Finally, the ALJ applied the actual performance test correctly. The R&R
8 concludes in a footnote that to the extent the ALJ made an “as actually performed”
9 finding, that finding was “clearly inadequate.” (R&R at 17 n.5.) The R&R provides no
10 rationale for this conclusion, and the court can discern none. (*See id.*) The court can
11 detect no legal error in the ALJ’s analysis, nor does Ms. Kennedy suggest any plausible
12 legal error, arguing only that substantial evidence does not support the ALJ’s finding.
13 (*See Resp. to Objections* at 3.) The ALJ’s findings are well reasoned and, more
14 importantly, supported by substantial evidence in the administrative record. (*See, e.g.,*
15 *AR* at 28, 31-32, 46, 69-70, 143, 176, 182-83.) “Substantial evidence” is more than a
16 scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind
17 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389,
18 401 (1971). The court has examined the administrative record in detail and concluded
19 that this standard is met here. The ALJ concluded that Ms. Kennedy’s past work was a
20 that of a receptionist, bookkeeper, and payroll clerk, which involved answering
21 telephones, doing payroll and billing—all of which are normally performed while sitting.
22 (*See AR* at 28, 31-32, 46, 69-70, 143, 176, 182-83.) The ALJ also found that Ms.

1 Kennedy had the capacity to perform sedentary tasks such as those that matched her
2 previous job description. (*See id.*) On appeal, the district court may not reweigh the
3 evidence or substitute its judgment for that of the Commissioner. *Thomas*, 278 F.3d at
4 954. It is the ALJ's job to determine credibility, resolve conflicts in medical testimony,
5 and resolve any other ambiguities that may exist. *Andrews*, 53 F.3d at 1039. When the
6 evidence is susceptible to more than one rational interpretation, the court must uphold the
7 ALJ's conclusion. *Thomas*, 278 F.3d at 954.

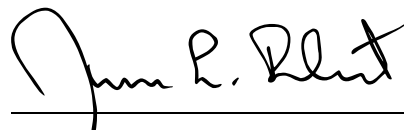
8 Accordingly, the court MODIFIES the portion of the R&R dealing with general
9 and actual performance and instead AFFIRMS that portion of the ALJ's opinion and
10 AFFIRMS the ALJ's decision in its entirety.

11 IV. CONCLUSION

12 For the foregoing reasons, the court hereby ORDERS as follows:

- 13 (1) The court ADOPTS the Report and Recommendation (Dkt. #) in part and
14 MODIFIES it in part as described above;
- 15 (2) The court AFFIRMS the ALJ's findings in their entirety; and
- 16 (3) The court DIRECTS the Clerk to send copies of this Order to Ms. Kennedy, to
17 counsel for the Commissioner, and to Magistrate Judge Donohue.

18 Dated this 30th day of April, 2013.

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22 JAMES L. ROBART
United States District Judge